

Republic of the Philippines
OFFICE OF THE PRESIDENT

Filipino Society of Composers,
Authors and Publishers (FILSCAP),
Complainant,

-versus-

Makati Shangri-la Hotel and Resort, Inc.,
Respondent.

x-----x

DSC No. 7-2001-00001

NOTICE OF DECISION

HALINA V. MINA
Counsel for Complainant FILSCAP
1365 E. Rodriguez Sr. Ave.
Quezon City

ROMEO A. BISON, JR.
Counsel for Respondent Shangri-la
9/F Salustiana D. Ty Tower
104 Paseo de Roxas corner Perea St.
Legaspi Village, Makati City

*... moved to Shangri-la Plaza
...
... 12-12-02*

GREETINGS:

Please be informed that on 02 December 2002, the Office of the Director General rendered a Decision in the above-titled case (copy attached).

Makati City, 03 December 2002.

Very truly yours,

for: CAG 12-12-02
ATTY. ENGRACIA Q. BANGAOIL
Attorney VI

SHANGRI-LA PLAZA

[Handwritten signature]
S/G [unclear] [unclear]
1:15 p.m.



INTELLECTUAL PROPERTY OFFICE

IPO Building, 351 Sen. Gil Puyat Avenue, Makati City, Philippines
Trunk Line: 752-5450 to 65 Fax: 890-4862

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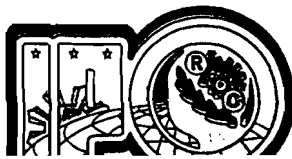
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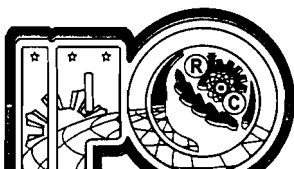
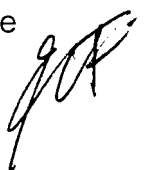
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DECISION

The main issue in this case of first impression is whether or not the playing of copyrighted music inside hotel guest rooms constitutes “*public performance*” for which the hotel owner is liable for the payment of royalties.

THE FACTS

On October 28, 1994, the Filipino Society of Composers, Authors and Publishers (FILSCAP) and Makati Shangri-La Hotel and Resort, Inc. (Shangri-La), entered into a “Copyright Music Performance License”, effective July 1, 1994 to December 31, 1998, wherein, for the payment of annual royalties, FILSCAP permitted Shangri-La to play its repertoire within the hotel premises, including the



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guest rooms. The said agreement covered three "types" of music: (1) live;¹ (2) mechanical background;² and (3) entertainment music.³

Shangri-La dutifully paid all the royalties during the effectivity of the license agreement. However, the agreement was not renewed. The Hotel and Restaurant Association of the Philippines (HRAP), of which Shangri-La was a member, started questioning the FILSCAP's right to collect royalties over mechanical background music, as defined in the agreement.

Thereafter, negotiations between FILSCAP and HRAP were conducted. HRAP agreed on the legality of FILSCAP's claim for payment of royalties as regards live and entertainment music, the only issue left for negotiation relative thereto being the rates. However, as to the right to collect royalties over mechanical background music, both agreed to seek the interpretation of the competent government agency regarding the issue.

THE CASE

Thus, on July 25, 2001, FILSCAP filed the instant complaint against Shangri-La allegedly due to the latter's refusal to pay royalties "for music transmitted inside hotel guestrooms" or the "mechanical background music."

¹ "Any music performed in person by performers such as singers and performers of musical instruments, and includes orchestra conductors or band leaders whether or not they combine their performance with other activities such as dancing or acting as comperes, as well as disc jockeys in discotheques wholly owned and/or operated by hotel within its premises." (Par. No. 1e, Copyright Music Performance License)

² "All background music performed other than by live performance in the Hotel Premises, provided that the performance is made by a gramophone, tape/cassette or compact disc player, radio or television set; or other similar contrivances or a loudspeaker connected to any of the equipment mentioned above, except contrivances operated by coins such as juke boxes." (Par. No. 1c, Copyright Music Performance License)

³ "Any music performed by mechanical contrivances primarily for entertainment in food and beverage outlets where music is essential in such bars, cafes, lounges, discotheques and the like which are owned and operated by the Hotel within the hotel premises." (Par. No. 1d, Copyright Music Performance License)

Accordingly, under the Revised Rules on Dispute Settlement of the Office, the parties underwent mediation proceedings to explore the possibility of an amicable settlement. During the Mediation Conference on August 6, 2001 three (3) issues emerged: (1) whether or not the playing of music inside the hotel guest rooms constitute public performance; (2) whether or not royalties for entertainment music played in food and beverage outlets within the hotel premises should be increased; and (3), whether or not royalties for live music performed within the hotel premises should be increased.

Anent the second and third issues, Shangri-La recognized FILSCAP's right to collect royalties, as it already did in negotiations prior to the filing of this case. Hence, the parties agreed to renegotiate on the rates thereof, sans IPO intervention. As regards the main issue, however, the parties were unwilling to compromise, demanding no less than an official "interpretation" from this Office.

To give the parties more time to reassess their position, and to give way to Shangri-La's request to involve the HRAP and the Hotel and Restaurant Financial Officers of the Philippines (HARFOPHIL) in the discussions, another conference was set on August 16, 2001.

At the second, and last, conference, with representatives of HRAP and HARFOPHIL in attendance, the parties reiterated their unwillingness to compromise on the main issue, prompting the Mediator to finally declare a "Failure of Mediation." The parties were required to submit, on or before August 27, 2001, their respective affidavit, with supporting documents, if any. The corresponding "Certificates of Failed Mediation" were personally delivered to the parties on August 17, 2001.

Shangri-La filed a Motion for Extension of Time on August 24, 2001 but the motion was rendered moot and academic, as, even before this Office could resolve the same, it filed its affidavit ("Position Paper") on the deadline. FILSCAP filed its affidavit on the same date.

On September 27, 2001, however, Shangri-La filed a Supplemental Position Paper. Not being a prohibited pleading and in the interest of substantial justice, the same was admitted.

ARGUMENTS

FILSCAP maintains that the playing of music inside hotel guest rooms constitutes "public performance" for the following reasons:⁴

- (a) (a) Hotel guest room clients constitute a public (citing the Intellectual Property Code of the Philippines, 1998; Berne Convention, 1971).
- (b) (b) Performance for profit (including performance for which no fee was charged for the privilege of listening to the music, as in a restaurant) constitutes public performance (citing FILSCAP vs. Tan, 148 SCRA 461; Herbert vs. Shanley and John Church Co. vs. Hillard Hotel Co., 242 US 591).
- (c) (c) There is public performance when the hotel, by making available to his guests, through the installation of radio receivers and loud speakers in the hotel rooms, music broadcasted from a radio station (citing Buck vs. Jewell-La Salle Realty Co., 283 U.S. 191).
- (d) (d) "Although a hotel guest room is a private place for purposes of the right of privacy, the same is a public place from the viewpoint of copyright."

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⁴ Affidavit, FILSCAP.

On the other hand, Shangri-La contends that the playing of FILSCAP's musical repertoire within the hotel guest rooms, by means of radio, television and other device, does not constitute a public performance thereof. The following arguments are proffered:⁵

- (a) (a) A guest room becomes a private domain the moment it is leased for a certain period of time. The reception of music therein "is similar to the use by a person of directed transmissions in said person's private flat or home."
- (b) (b) Merely providing radio and other devices in the guest rooms do not constitute performance since, unless activated at the whim of the guest, these devices are "mere" room "fixtures."
- (c) (c) The performance is not public as broadcast is "only audible to a guest, or that guest's family, or the guest's closest social acquaintances."⁶
- (d) (d) "The manner of operation by the Makati Shangri-La of its FM receiver system is clearly the relay of FM radio station broadcasts to the guest rooms of Makati Shangri-La's guests as mandated by the exception granted to hotels by Section 111(a) (1) of Title 17 (Copyrights) of the Code of Laws of the United States from copyright infringement."⁷
- (e) (e) The use of FILSCAP's music is "use by a natural person exclusively for his own personal purposes", one of the limitations on copyrights under the IP Code (citing Sec. 212.1).⁸

⁵ Position Paper, Shangri-La.

⁶ Supplemental Position Paper, Shangri-La.

⁷ Supplemental Position Paper, Shangri-La.

⁸ Supplemental Position Paper, Shangri-La.

DISCUSSION

The resolution of the main issue rests on the determination of whether Shangri-La, in providing copyrighted music inside its individual guest rooms, is definitely engaged in "*public performance*"⁹ under the Intellectual Property Code of the Philippines (Republic Act No. 8293), which enumerates three (3) essential requirements, to wit:

1. PERFORMANCE

This "*performance*" consists in:

- (a) (a) for work other than an audiovisual work: a recitation, playing, dancing, acting or otherwise performing the work, either directly or by means of any device or process;
- (b) (b) for audiovisual work: a **showing** of its images in sequence and the **making** of sounds accompanying it **audible**; and
- (c) (c) for sound recording: **making** the recorded sounds **audible**.

The audiovisual technician of Shangri-La described the hotel's FM receiver system as follows:

gaf

⁹ "Public performance,' in the case of the work other than an audiovisual work, is the recitation, playing, dancing, acting or otherwise performing the work, either directly or by means of any device or process; in the case of an audiovisual work, the showing of its images in sequence and the making of the sounds accompanying it audible; and, in the case of a sound recording, making the recorded sounds audible at a place or at places where persons outside the normal circle of a family and that family's closest social acquaintances are or can be present, irrespective of whether they are or can be present at the same place and at the same time, or at different places and/or at different times, and where the performance can be perceived without the need for communication within the meaning of Subsection 171.3;" (Subsection 171.6, Intellectual Property Code of the Philippines)

“4. X X X The FM receiver system is the equipment that the Makati Shangri-La uses to receive FM radio station broadcasts. The said system of the Makati Shangri-La is composed of an FM antenna located at the roof-deck level, the FM tuner/receiver unit and the channel modulator located at the Basement 1 level, and the television unit at the Makati Shangri-La’s guestrooms.

5. The FM radio broadcasts are initially received by the FM antenna and then by the FM tuner/receiver unit. The FM radio broadcast signals received by the FM antenna and the FM tuner/receiver unit, then pass through the channel modulator unit, which converts the FM radio frequency into a television channel frequency in order that the FM radio broadcast may be heard by the Makati Shangri-La’s guests through the television set units in the guest rooms. X X X”¹⁰

The operation of the “**channel modulator**” in the said system **enabled the guests in the individual rooms to hear the broadcast** upon switching on of the television set. The explanation made by the audiovisual technician leaves no doubt that **without** the said modulator, the radio frequency **will not be converted** to television frequency and consequently, the broadcast **will not be heard** via the television set. Thus, from the above description, it can be gleaned that Shangri-La, in distributing the FM radio broadcast signals to each guest room through its FM receiver system, is “*making the recorded sounds audible*” under (c) above.

In a similar case involving a restaurant equipped with a “radio-over-speaker” sound system that provides for a consistent level of background music throughout its 1,500 square feet dining area, the United States Court of Appeals, in ruling that the said restaurant is publicly performing, said:

“The record makes clear that the system in place at the Port Town Family Restaurant is more sophisticated than the individual system in Claire’s Boutiques. It cannot be characterized fairly as composed of only home-type components, nor can it be said to be configured in a manner commonly found in a home. X X X Without the addition of the transformers, the receiver is designed to drive only four speakers over moderate lengths of speaker cable. X X X because of the implementation of the transformers in the system configuration, the receiver effectively

¹⁰ Affidavit of Job A. Atuares, Shangri-La’s audiovisual technician.



can power up to forty speakers wired in parallel, thirty-six speakers more than the receiver was designed to handle without overloading X X X. As the court noted in *Claire's Boutiques*, the extent to which the system is augmented for the purpose of improving the performance is a relevant factor to consider. X X X"¹¹

The inclusion of the "channel modulator" in Shangri-La's FM receiver system is **analogous** to the inclusion of transformers in the subject restaurant's radio system in the above-quoted case, which made it possible for more customers therein to listen to the radio broadcast. Therefore, it is but logical that Shangri-La be also deemed as "*performing*."

There would have been no "*performance*" had the radio broadcasts been received by the guests through a simple, "stand-alone" radio receiver or even a receiver system, but without any "enhancing" feature which would permit it to perform functions which would otherwise have been beyond mere reception of signals. In that instance, the one "*making the recorded sounds audible*" would have been the broadcasting organization/radio station alone. Although Shangri-La provided the radio set, there would be no performance to speak of since its only role would be limited to merely receiving the signals. The following ruling of United States Supreme Court would have been applicable:

"If, by analogy to a live performance in a concert hall or cabaret, a radio station 'performs' a musical composition when it broadcasts it, the same analogy would seem to require the conclusion that those who listen to the broadcast through the use of radio receivers do not perform the composition. X X X (emphasis supplied)

'One who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons within hearing, does not 'perform' within the meaning of the Copyright law.' (Buck v. Debaum, 40F.2d 734, 735) X X X."¹²

¹¹ Cass County Music Company, et al. vs. Vasfi Muedini, D/B/A Port Town Family Restaurant, U.S. Court of Appeals, 7th Circuit, No. 93-3109.

¹² Twentieth Century Music Corp. vs. Aiken, 422 U.S. 151 (1975).

Television and AM radio broadcasts

It is necessary, though, to make a distinction between the reception of the FM radio broadcasts and **free-to-air television and AM radio broadcasts**. Although the television sets are connected to the FM receiver system, the latter merely functions as a **distribution system** for such television broadcasts. Shangri-La's audiovisual technician clearly stated in his affidavit that for FM radio broadcasts, the channel modulator "converts the FM radio frequency into a television channel frequency in order that the FM radio broadcast may be heard." In other words, **for FM radio broadcasts**, the said system performs an **additional function** without which the FM broadcasts could not be heard. Thus, **for free-to-air television broadcasts**, the system merely serves as a **conduit for the distribution of the signals** directly received from the television station. **The hotel makes no retransmission to the public. The one engaged in "public performance" therein is the broadcasting organization.**

The reception of **AM broadcasts** is, like that of free-to-air television, **merely reception of transmission** from the broadcasting station. AM signals, unlike FM, merely require an internal antenna to be heard. Shangri-La does not have to do anything or add any special equipment to hear the broadcast. Thus, it is **merely at the receiving end, not publicly performing.**

2. PRESENCE OF A PUBLIC AT THE SAME OR DIFFERENT TIME OR PLACE

The recorded sounds must be made audible before a "*public*." Albeit not categorically stated as a definition of "*public*", the IP Code expressly requires that the "*performance*" must be "*at a place or at places where persons outside the normal circle of a family and that family's closest acquaintances are or can be present.*" Moreover, it matters not whether they are present "*at the same place and at the same time, or at different places and/or at different times.*"



The **hotel guests, as a whole**, i.e., all the guests of the entire hotel occupying the individual guest rooms, **constitute a "public."** Obviously, they belong to different families, not just to one family. Neither are they the closest acquaintances of one family. As is often the case, they may not be even acquainted with the other guests in the other rooms. Naturally, these guests would occupy the rooms at their own convenient time, choosing whatever room they fancy, or settling for whatever is available or affordable. Evidently, when listening to the radio or watching television in their respective rooms, if ever they decide to, these hotel guests would be doing so simultaneously, or otherwise, with the other guests.

"Private" vs. "public" place

Parenthetically, both parties, in their respective pleadings, and even during the mediation conferences, dwelt rather extensively on the nature of the individual guest rooms (as to whether it is private or public) in order to determine whether there is *"public performance."* The Code, however, is **ostensibly silent** on the issue. Section 171.6 thereof mentions the term *"place"* **without any qualifications.** It is a principle in statutory construction that "where the law does not distinguish, we should not distinguish." Thus *"place"*, under the Code, could refer to either private or public place. **Therefore, the existence of "public performance" does not depend on the nature of the place where the music is performed or made audible but on whether or not these works are actually performed or made audible to the public.**

3. PERFORMANCE PERCEIVED WITHOUT NEED FOR "COMMUNICATION TO THE PUBLIC"¹³

¹³ "Communication to the public' or 'communicate to the public' means the making of a work available to the public by wire or wireless means in such a way that members of the public may access these works from a place and time individually chosen by them;" (Subsection 171.3, Intellectual Property Code of the Philippines)

The concept of "*communication to the public*" under Subsection 171.3 of the Code must be read in relation to Subsection 202.9¹⁴ thereof, which expressly excludes "*broadcasting*" within its purview. Thus, "*communication to the public*" may refer to any mode of transmission to the public other than by radio or television broadcasts, a contemporary example of which is transmission by way of the Internet.

In the instant case, since the music being played inside the guest rooms are **FM radio broadcasts**, it is clear, then, that the performance was perceived without need for "*communication to the public*" and, therefore, Shangri-La is engaged in "*public performance.*"

Performance for profit

The realization of profit is not essential in determining whether or not there is "*public performance.*" Significantly, the Code never included the profit angle in the definition of the concept. Such circumstance may be indicative, though, of the presence of a public since, in the ordinary course of things, only persons other than one's family or closest acquaintances are usually charged for any service rendered.

ROYALTY RATE DETERMINATION

While it is true that a detailed computation of the royalty rate is essentially a contractual matter and a business prerogative that is best left to the parties concerned to determine, it is axiomatic that the said determination be tempered with equity, considering that the use of copyright, and indeed, of all other kinds of intellectual property rights, bears a social function.¹⁵ In other words, the State

¹⁴ "'Communication to the public of a performance or a sound recording' means the transmission to the public, by any medium, otherwise than by broadcasting, of sounds of a performance or the representations of sounds fixed in a sound recording." (Subsection 202.9, Intellectual Property Code of the Philippines)

¹⁵ Section 2, Intellectual Property Code of the Philippines.

grants protection to the creators of literary, artistic and scientific works in exchange for the beneficial use to society of such works. The computation of the rates ought to reflect the foregoing principle and should not result in the oppression of the person or entity using a copyrighted work.

Thus, in the present case, the royalty rate computation should take into account the actual occupancy of the hotel rooms. Surely, it would be highly inequitable to charge the hotel royalties for unoccupied rooms. In fact, even for the occupied rooms, there is a great probability that the occupant will not use the radio at all.

RULING

WHEREFORE, it is hereby declared that Shangri-La's playing of FM radio broadcast music inside the individual guest rooms which is making the recorded sounds audible to the public at the same or different time and/or place, through the use of its FM receiver system, constitutes public performance under the Intellectual Property Code of the Philippines for which the respondent hotel is liable to FILSCAP for the payment of royalties computed taking into account actual occupancy of the hotel rooms.

However, the Shangri-La is not liable to the payment of royalties with regard to the playing of free-to-air television and AM radio broadcast music as the same merely constitutes a reception of the broadcast, not public performance under the Code.

SO ORDERED.

Makati City.02 December 2002.


EMMA C. FRANCISCO
Director General

Copy Furnished :

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